IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 606

STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM ALLEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

PREFACE

Respondent's Brief on the merits does not directly address the issue involved in this case—whether unruly courtroom behavior by a defendant effects a waiver of the right of confrontation—so much as it attempts to pick around the edges of Petitioner's Brief with criticisms which are, to say the least, disingenuous. We feel no compulsion, therefore, to reiterate the substance of our original argument, and this Reply is consequently limited to a brief refutation of the Respondent's Brief.

I.

(1) Respondent: "Except for a voluntary absence from court once the trial begins, this right [of confrontation] cannot be waived" (Resp. Br. 3).[1]

Reply: Respondent relies upon *Lewis* v. *United States*, 146 U.S. 370, 372 (1892) to support this flat assertion. But the issue in *Lewis*, a federal capital case, was whether the defendant was deprived of the right of confrontation, or, more properly, the right to be present at all stages of trial, when the record reflected that the jury had been selected out of his presence, a procedure to which he made proper and timely objection. This Court held that his right to be present could not be denied in this way. The *holding* of *Lewis*, therefore, does not govern this case or support Respondent's statement.

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1. Citing Lewis v. United States, 146 U.S. 370, 372 (1892).

Perhaps Respondent's reliance is based upon a *dictum* of Mr. Justice Shiras that "A leading principle . . . is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has at times, and in the cases of misdemeanors, been somewhat relaxed, yet in *felonies* it is not *in the power* of the prisoner, either by himself or his counsel, *to waive the right to be personally present during the trial.*"[2]

This statement of the law has since been repudiated, not only by almost every state in the Union, but by this Court as well. Only 20 years later, this Court, after examining the state and lower federal court precedents, *held* that the right of presence or confrontation could be waived in felony cases. *Diaz* v. *United States,* 223 U.S. 442, 455 (1912). And, in *Snyder* v. *Massachusetts,* 291 U.S. 97 (1934), this Court directly and explicitly repudiated the *dictum* of *Lewis.*[3]

(2) Respondent: "In *Diaz,* the trial was conducted in accordance with the rules of procedure of the Spanish Law; the defendant had no right to a speedy trial or a jury trial. The case was conducted as if it was civil litigation. The Sixth Amendment to the United States Constitution was not applicable but rather a section of the Philippine Civil Government Act (which did not include the right of confrontation)"[4] (Resp. Br. 5).

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2. *Lewis* v. *United States,* 146 U.S. at 372 (Emphasis added.)

3. See Petitioner's Brief at 12, ft. 15.

4. Respondent has, since the filing of his Brief, acknowledged, by letter of February 2, 1970 to the Clerk of this Court, that this parenthetical statement is in error.

Reply: This language, most of which is taken from the dissenting opinion, is simply not in point. On the issue of whether the right of confrontation was violated by the voluntary absence of Diaz from the trial, both the majority and the dissent *agreed* that the question was governed by §5 of the Philippine Civil Government Act—a congressional enactment and not a rule of "Spanish" criminal procedure—and both the majority and the dissent *agreed* that §5 was to be interpreted as the Court would interpret the Confrontation Clause of the Sixth Amendment.[5]

(3) Respondent: "Petitioner supports his statement that *Snyder* v. *Massachusetts* repudiated *Hopt* and *Lewis* by quoting out of context from a sentence and a footnote. Petitioner knows that Respondent's case is based on *Hopt*

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5. "An identical or similar provision [to §5] is found in the constitutions of the several States, and *its substantial equivalent is embodied in the Sixth Amendment* to the Constitution of the United States. It is the right which these constitutional provisions secure to persons accused of crime in this country *that was carried to the Philippines by the congressional enactment*, and, therefore, according to a familiar rule, the prevailing course of decision here may and should be accepted as determinative of the nature and measure of the right there." 223 U.S. at 454-55 (majority opinion) (emphasis added.)

"Barring the right to indictment and trial by jury the defendant charged with a felony before a Philippine court has substantially the same rights as though he were on trial in a United States court. And if this conviction can stand, *it must be because the same things would be proper in this country, where the language of the Constitution is, in this respect, substantially the same as that of Philippine Bill of Rights* [citing §5]." (dissenting opinion at 223 U.S. 460) (emphasis added.)

and *Lewis*. If these cases were diminished or limited by *Snyder* or any other case Petitioner would have elaborated in greater detail" (Resp. Br. 5).

Reply: First, the charge that we are able to rely upon *Snyder* as favorable precedent only by quoting from that case "out of context" is untrue. In our original Brief, we said that the *Snyder* case rejected *Hopt* and *Lewis* as being not only *dictum*, but based solely upon the early common law. For this proposition we quoted the words of Mr. Justice Cardozo from the footnote in the *Snyder* opinion at 291 U.S. 117 (Pet. Br. 12, ft. 15). Since the only issue in *Snyder* was whether a jury view in the absence of a defendant violated the Due Process Clause,[6] and since the petitioner Snyder expressly relied upon *Hopt* and *Lewis*,[7] the action of this Court in denigrating the force of those two opinions, directly and expressly, could not be more plain. It is, to put it mildly, impertinent of Respondent to suggest that our reliance is based solely upon the device of quotation out of context.

Second, Respondent but exposes the weakness of his position when he complains that "Petitioner knows that Respondent's case is based on *Hopt* and *Lewis*." It is certainly not the fault of Petitioner if Respondent chooses to cling to these decisions long after they have been directly repudiated by this Court and almost every other court in the land. If the force of their *dictum* was so weak that Mr. Justice Cardozo could dispose of them in a summary

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6. The *Snyder* Court assumed, for purposes of decision, that due process included the protections of the Confrontation Clause of the Sixth Amendment. 291 U.S. at 106.

7. See 291 U.S. at 99.

footnote, we do not understand how we can be forced to "elaborate in greater detail" on why they are no longer vital precedents—if they ever were.

(4) Respondent: "Petitioner contends that the right to confront witnesses exists only in capital cases. Although the right of confrontation has been relaxed somewhat in misdemeanor cases, there is nothing in the Constitution or the case law which abridges this right in any type of felony case" (Resp. Br. 7).

Reply: This convoluted, straw man argument is totally out of place. Petitioner has never contended that the right of confrontation "exists only in capital cases" or that there was anything in the Constitution or the case law which "abridged" this right in felony cases. What we did say in our original Brief was that the early common law rule held the defendant's presence to be a jurisdictional prerequisite in all cases, but if any vestige of that *jurisdictional rule* still survives it does so only in capital cases, and that in all other cases, both felony and misdemeanor, the defendant may waive his right to be present (Pet. Br. 8-10, 13). This argument has nothing to do with whether the right of confrontation exists in any particular case. It exists in all cases. Our argument that the right was waived under the circumstances here is necessarily founded upon the recognition that the right existed in this felony case.

(5) Respondent: The argument is made that our authority consists only of trial court opinions and the "fact that no other decisions can be found suggests that in other instances the unruly defendant was not removed but was kept in court by force" (Resp. Br. 8). It is also suggested that our observation that the use of shackles and gags may improperly elicit jury sympathy for a defendant

is "conjecture" and that, indeed, the opposite might well be true (Resp. Br. 8).

Reply: We have cited every case *on point* that exhaustive research in Anglo-American jurisprudence was able to disclose. Of more importance than the rank of the courts upon which we rely is the fact that Respondent has cited *no* case which has ever held that the expulsion of an unruly defendant violates the Sixth Amendment or any other rule.

Moreover, we have no quarrel with those cases which have upheld the use of shackles or gags. Our point is that a trial judge should not be forced into a constitutional straitjacket which compels him to use *only* that remedy to deal with a defendant determined to exploit his right of confrontation as the weapon by which the orderly processes of justice are destroyed. Whether the inappropriate use of shackles and gags may prejudice the defendant or the state is not important. What is important is that this remedy may, in a particular case, have prejudicial side effects which could be avoided if the Sixth Amendment does not foreclose the exercise of judicial discretion in seeking and employing other appropriate remedies.

(6) Respondent: "First, the defendant could be removed to another room and the trial televised to him. Secondly, the defendant could be seated in a soundproof booth in the courtroom from where he can see and hear the proceedings. In each instance the defendant could 'confront' the witnesses and communicate with his attorney by telephone" (Resp. Br. 9).

Reply: ". . . to make the securities of the constitution depend upon such quiddities is to cheapen and degrade them."[8]

(7) Respondent: "To permit an unruly defendant to be excluded from the trial is to condition the right of confrontation upon good behavior" (Resp. Br. 9).

Reply: Precisely. There is nothing strange about the notion that enjoyment of constitutional rights may be conditioned upon one circumstance or another. The right of free speech is conditioned upon the assumption that it will not be employed in a libelous or obscene manner. The privilege against self-incrimination is conditioned upon the assumption that the witness will not seek only to give evidence on direct examination and avoid cross-examination by the State. Moreover, there is hardly a constitutional right in existence which the accused does not have the power to waive, by word or deed. That is all that is in issue here.

(8) Respondent: "Was Allen abusive or unruly? Respondent does not believe so. If Allen was unruly it was only on three occasions[9] . . . . The other times Allen was in court—during the prosecution's case to be identified and for his defense—he conducted himself properly" (Resp. Br. 9).

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8. *Snyder* v. *Massachusetts*, 291 U.S. at 122.

9. Respondent claims that one of the "occasions" was "when he was brought into Court in shackles and a prison uniform . . . (A. 38)" (Resp. Br. 9). Respondent was a prisoner in the County Jail during the time he was not in court. County Jail prisoners do not wear prison uniforms at trial. Nothing on page 38 of the Abstract, or any other part of the record, supports Respondent's claim that he was required to appear before the jury in a "prison uniform."

Reply: Respondent misconceives the thrust of our argument if he believes that it is important how many times he was unruly. In our original Brief, we detailed all of the conduct which led to his exclusion (Pet. Br. 23-28). What is crucial is that the record demonstrates beyond a shadow of a doubt that Respondent's conduct, whatever its incidence or duration, was designed to interfere with the orderly presentation of the State's case and that he knowingly continued it only to the point where further exclusion would interfere with the presentation of *his* evidence.

(9) Respondent: "If the threat of exclusion does not accomplish the desired result of controlling and quieting a defendant, may a trial court escalate by denying some other rights, e.g., jury trial, right to counsel?" (Resp. Br. 10).

Reply: No.

II.

THIS CASE IS NOT MOOT.

The Respondent misconceives the legal significance of parole and its ramifications and furthermore cites no authority for his incorrect assumption that the instant cause is moot.

This Court has concluded that a state prisoner who has been placed on parole is "in custody" for the purposes of a federal court determination of whether his state sentence was imposed in violation of the United States Constitution. *Jones* v. *Cunningham,* 371 U.S. 236 (1963).[10]

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10. Parole in *Jones* was granted while petitioner's appeal was pending in the Court of Appeals. 371 U.S. at 236 (ft. 1).

In *Jones* the fact that the petitioner's parole released him from immediate physical imprisonment did not remove him from the "custody" of the parole board because of the Court's conclusion that parole imposes conditions which significantly confine and restrain freedom.[11]

In *Carafas* v. *LaVallee*, 391 U.S. 234 (1968) this Court held that once federal *habeas corpus* jurisdiction attached with respect to prisoners in state custody, such jurisdiction was not at an end prior to the completion of such proceedings notwithstanding even the final expiration of the petitioner's sentence.[12] Recognizing the collateral consequences which flow from felony convictions, this Court dismissed the claim of mootness.[13]

Clearly the respondent has both mistakenly interpreted the concept of mootness and the entire body of law which surrounds that legal proposition.

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11. 371 U.S. at 243.

12. The petitioner in *Carafas* applied to the United States District Court for a writ of *habeas corpus* in June, 1963. He was in custody at that time. On March 6, 1967 the petitioner's sentence expired, and he was discharged from the parole status on which he had been since October 4, 1964. A writ of certiorari issued on October 16, 1967. 391 U.S. at 236.

13. 391 U.S. at 237-238. See also Sibron v. New York, 392 U.S. 40, 53-58 (1968). In Illinois, Allen's conviction for an infamous felony carries with it similar disabilities, such as incapacity to vote and to serve as a juror. Ch. 38, §124-2 Ill. Rev. Stat. (1967).

CONCLUSION

For the reasons stated in our original Brief, and in this Reply Brief, Petitioner requests that the judgment of the Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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